Office-Supreme Court, U.S.
FILED
DEC 14 1961
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 550

ANTHONY MARCHITTO,
Petitioner,

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront Commission of New York Harbor,
Attorney for Appellee,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	4
Argument	6
I. Petitioner's contention that he was denied pre-trial discovery and a hearing in violation of due process was not properly raised in the courts below and in any event is without merit	6
A. Petitioner's Motion for Pre-Trial Discovery	7
B. The Alleged Denial of a Hearing	11
C. Petitioner's Notice to Admit	15
II. Petitioner's contention that under the Waterfront Commission Act he was immune from service of process and further that he was fraudulently enticed into New York by the Commission was not properly raised in the courts below and in any event is without merit	16
III. Petitioner's contention that he was not apprised of the subject matter of the investigation was never asserted before the Commission and in any event is without merit	19
IV. Petitioner's contention that the Commission failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution was never asserted before the Commission and in any event is without merit	21

PAGE

V. Petitioner had no constitutional right to refuse to testify upon the ground that he had not been granted immunity from federal prosecution 23

Conclusion 25

Appendix A—Excerpt From Petitioner's Brief in Appellate Division 26

Appendix B—Excerpt From Petitioner's Brief in Special Term 27

Cases:

Barenblatt v. *United States*, 360 U. S. 109 .....19, 21

Bata v. *Bata*, 282 App. Div. 862, 124 N.Y.S. 2d 722 (1st Dept. 1953) 11

C.I.O. v. *McAdory*, 325 U. S. 472 .....11, 16

Commission of Investigation v. *Lombardozzi*, 7 A. D. 2d 48, 180 N.Y.S. 2d 496 (1st Dept. 1958), aff'd. 5 N. Y. 2d 1026, 6 N. Y. 2d 744, *cert. den.*, 360 U. S. 930 21

Commissioner v. *Shamberg's Estate*, 144 F. 2d 998 (2nd Cir. 1944), *cert. den.* 323 U. S. 792 25

DeVeau v. *Braisted*, 363 U. S. 144 25

Frank v. *Rowland & Shafto*, 169 App. Div. 918, 153 N.Y.S. 926 (1st Dept. 1915) 9

Hinderlider v. *LaPlata River Co.*, 304 U. S. 92 25

In the Matter of the Application of the Waterfront Commission of New York Harbor, 39 N. J. Super. 33 (1956) 17

In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto), 32 N. J. 323 (1960) 4, 14, 20

PAGE

In re Flanagan's Will, 271 App. Div. 1014, 68 N.Y.S. 2d 248 (2nd Dept. 1947) 9

Jefferson Title & Mortgage Corp. v. *Blue Spruce Realty Corp.*, 263 App. Div. 963, 33 N.Y.S. 2d 28 (2nd Dept. 1942) 9

Knapp v. *Schweitzer*, 357 U. S. 371 ..... 23, 24

Lamb v. *Schmitt*, 285 U. S. 222 17

Mills v. *State of Louisiana*, 360 U. S. 230 24

O'Connor Long Island Properties Corp. v. *Brackman*, 288 N. Y. 23 9

Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186 14

Parker v. *Illinois*, 333 U. S. 571 ..... 11, 16

Rowland v. *State*, 172 N.Y.S. 2d 420 (Ct. Cl., 1957) .. 15

Stembridge v. *Georgia*, 343 U. S. 541 11

Watkins v. *United States*, 354 U. S. 178 20

CONSTITUTION AND STATUTES:

Act of August 12, 1953, c. 407, 67 Stat. 541 24

New Jersey Laws 1956, c. 194 23

New Jersey Laws 1956, c. 19 17

New York Civil Practice Act, Section 580 ..... 8, 9, 16

New York Laws 1956, c. 457 17

New York Laws 1957, c. 188 23

New York Laws 1961, c. 211 6

New York Penal Law, Section 2447 23

28 U.S.C. Section 1257(3) 2

PAGE

United States Constitution, Fifth Amendment 24

Waterfront Commission Act 2

Article IV (McK. Unconsol. Laws 9810) 17

Section 5-b(5) (McK. Unconsol. Laws 9906) ..5, 21, 23

Section 5-m (McK. Unconsol. Laws 9917) 16, 17

MISCELLANEOUS:

McKinney's 1957 Session Laws of New York (Legislative Memorandum of Waterfront Commission), page 2053 23

Supreme Court of the United States

OCTOBER TERM, 1961

No. 550

ANTHONY MARCHITTO,

Petitioner.

v.

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

Since the Court of Appeals of the State of New York first dismissed petitioner's appeal upon the ground that no substantial constitutional question was directly involved in such appeal and then denied petitioner's subsequent motion for leave to appeal, the Court of Appeals did not render an opinion herein. And since the Appellate Division, First Department, of the State of New York, unanimously affirmed without opinion the various orders of the Supreme Court of the State of New York (hereinafter referred to as "Special Term") involved herein, the Appellate Division also did not render an opinion.

The opinion of Special Term adjudicating petitioner guilty of civil contempt is printed in the Appendix to the petition herein at page 29. The opinions of Special Term denying petitioner's motion to set aside the service herein and denying another motion by petitioner for discovery and an examination before trial are printed, respectively, at pages 83 and 140 of the record herein.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether petitioner was denied due process allegedly because he was denied not only pretrial discovery and examination but also a hearing and was adjudicated in contempt solely upon affidavits where (a) petitioner's appeal from the denial of pretrial discovery and examination was not properly taken, (b) petitioner did not properly raise the alleged denial of a hearing in the courts below, (c) petitioner's request for a hearing, if any, was narrowly limited to the Commission's stated reasons for requiring petitioner's testimony, and (d) the instant contempt proceeding did not present any triable issues of fact.

2. Whether petitioner was immune from service of process under the Waterfront Commission Act and, further, was denied due process because his entry into the State of New York was allegedly enticed by the Commission's fraud and misrepresentation where (a) petitioner's appeal from the denial of his motion to set aside service was not properly taken, (b) petitioner was served with contempt papers in aid of the very matter for which his presence was required in New York in the first instance, the intendment of the statutory immunity being to grant an exemption from process only in an unrelated matter, and (c) the Commission continued its subpoena in force for the explicit purpose of bringing petitioner before a court to answer for his contumacious conduct and the Commission gave petitioner upon his return to New York an opportunity to change his mind and to testify, which petitioner refused to do.

3. Whether petitioner was denied due process allegedly because he was never apprised of the subject matter of the investigation where (a) petitioner never asserted this objection before the Commission, (b) the subject matter of the investigation was made unequivocally clear in a prior contempt proceeding by the Commission against petitioner in New Jersey and petitioner was otherwise apprised of the subject matter of the investigation, and (c) petitioner has been adjudicated guilty only of a *civil* contempt.

4. Whether petitioner's contention that the Commission allegedly failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution is meritorious where (a) petitioner never asserted this objection before the Commission and (b) the immunity statute specifically provides that a witness shall have immunity from prosecution even if there is a failure to so notify the prosecutors.

5. Whether petitioner, after being granted immunity from state prosecution by the Commission, had a constitutional right to refuse to testify because he had not been granted immunity from federal prosecution, upon the ground that, according to petitioner's conclusory allegations, not supported by any facts whatever in the record, there was cooperation between the Commission and federal agencies and upon the further ground that the Commission was created by an interstate compact to which Congress had given its consent.

Constitutional Provisions and Statutes Involved

The various constitutional and statutory provisions involved herein are set forth in the Appendix to the petition at pages 20-24 and accordingly no purpose would be served in repeating them here.

Statement

This is a petition for certiorari to review an order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal from an order of the Appellate Division unanimously affirming without opinion an order of Special Term which adjudged petitioner guilty of civil contempt and which ordered that petitioner be fined $250 and that he be incarcerated until he answers certain questions pursuant to a subpoena of the Waterfront Commission and pays said fine.

The facts are as follows. In the course of a preliminary investigation prior to its public hearing in June, 1960, the Waterfront Commission received information that charters had been granted by the International Longshoremen's Association (the union that represents all longshoremen and other waterfront workers in the port of New York district) to certain notorious hoodlums and criminals for Local 1823 to organize white collar workers in industrial plants in New Jersey and Pennsylvania and also for Local 1478 to organize marine warehousemen in certain warehouses in the port of New York district (R. 16-17, 109-110). As part of its preliminary investigation into criminal influence in the ILA, the Commission on July 1, 1959 served a subpoena on petitioner, a resident of Jersey City, New Jersey (R. 23), requiring him to testify at the Commission's offices in New York City (R. 109). However, petitioner refused, upon various grounds, to be sworn and to testify and accordingly the Commission instituted contempt proceedings against petitioner in the courts of New Jersey, which adjudged petitioner guilty of civil contempt. *In the Matter of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, 32 N. J. 323 (1960) (R. 117-135). Upon remand from the Supreme Court of New Jersey, petitioner invoked for the first time his privilege against self-

incrimination and therefore the judgment of civil contempt against petitioner was vacated on June 3, 1960 (R. 111).

In the meanwhile, as a result of information obtained during the course of its preliminary investigation into criminal influence in the ILA, the Commission, by resolution adopted June 2, 1960, determined that it would be in the public interest to hold public hearings with a view to determining, among other things, whether the Commission should make legislative recommendations to the Governors and Legislatures of New York and New Jersey (R. 114). These public hearings commenced on June 16, 1960 in New York City (R. 114). Petitioner, while at the offices of the Commission in New York City on June 10, 1960 in connection with its aforesaid preliminary investigation, was served with the within subpoena requiring his testimony at the Commission's public hearings (R. 21-22, 114).

On June 22, 1960, the duly adjourned return date of the within subpoena, petitioner appeared at the Commission's public hearings in New York City (R. 17). Petitioner refused to answer certain questions on the ground that his answers would tend to incriminate him (R. 17). Pursuant to the provisions of Section 5-b(5) of the Waterfront Commission Act (McK. Unconsol. Laws 9906) (Pet., pp. 23-24), the Commission granted petitioner immunity from prosecution and directed him to answer the questions (R. 17, 33-42). Petitioner persisted in his refusal to testify upon the grounds: (1) that the written notice of the Commission's intention to grant immunity to petitioner given by the Commission to the Attorney Generals of New York and New Jersey and to various district attorneys set forth only the subject matter upon which petitioner was to be questioned, and not the specific questions, themselves, and (2) that he (petitioner) had not been given immunity from federal prosecution (R. 17, 34-37).

In view of appellant's refusal to testify, notwithstanding the grant of immunity from prosecution, the Commission

instituted the instant contempt proceeding. Petitioner asserted in the courts below the same two grounds which were asserted by him at the Commission's public hearings for his refusal to testify. In addition, however, after the instant contempt proceeding was instituted, petitioner also asserted a multiplicity of other grounds for his refusal to testify.

Upon the conclusion of its public hearings, the Commission issued a Special Report to the Governors and Legislatures of the States of New York and New Jersey in December, 1960. In this Report, the Commission reported that the present law was being circumvented by criminal elements and recommended new legislation to strengthen the Waterfront Commission Act. These legislative recommendations have been enacted in New York (1961 Laws of New York, c. 211) and are presently pending in the New Jersey Legislature.

ARGUMENT

POINT I

Petitioner's contention that he was denied pre-trial discovery and a hearing in violation of due process was not properly raised in the Courts below and in any event is without merit.

Petitioner contends that he required discovery and an examination before trial in order to prove certain defenses to the within contempt proceeding (e.g., lack of a *bona fide* investigative purpose; Commission's failure to apprise him of the subject matter of the investigation, etc.) and that accordingly his motion therefor was improperly denied (pet., p. 6); that, in fact, petitioner's allegations respecting these defenses were legally admitted by the Commission's failure to contest his Notice To Admit (pet., pp. 6-7); and

that, as the capstone, petitioner's specific request for hearing was denied by Special Term which held him in contempt upon nothing but contested affidavits (pet., pp. 7-8). Hence, petitioner's first asserted reason for granting certiorari is that "although all of petitioner's contentions are deemed admitted . . . he was denied the opportunity to buttress his case by a deposition or discovery, his demand for hearing was rejected, and he was adjudged in contempt on the basis of affidavits whose allegations he contested" (pet., p. 9), all in claimed violation of due process.

Petitioner's due process argument may be best answered by considering *seriatim* the various contentions subsumed thereunder, that is, the denial of petitioner's motion for discovery, the alleged denial of a hearing, and petitioner's Notice To Admit.

A. Petitioner's Motion for Pre-Trial Discovery.

As was noted by Special Term, petitioner's application for pre-trial examination and discovery was exceedingly broad (R. 140-41):

> ". . . Marchitto [petitioner] has now moved for an order for examination before trial, pursuant to sections 292-a, 296, 308, and 324 of the Civil Practice Act, directing that the Waterfront Commission appear for such examination by its stated members, its executive director, its general counsel, and its agents and employees 'who participated in the examinations and investigations and service of process upon the respondent.' The subject matter upon which Marchitto seeks to examine the Waterfront Commission is exceedingly extensive. Without repetition of the matters stated in the order to show cause, it may be stated concisely that the subject matter of his inquiry pertains to matters which involve the subject matter of the Commission's investigation, its jurisdiction, its purpose in subpoenaing him, the Commission's compliance with statutory conditions precedent to granting of in-

munity to witnesses, the nature of the Commission as a federal instrumentality and matters relating to the pertinency and purpose of the Commission's investigation and questions put to Marchitto upon his examination before the Waterfront Commission. Moreover, he seeks a practically unlimited discovery and inspection of the transcripts of hearings and investigations conducted before the Commission at which the respondent appeared; all testimony taken by the Commission and its agents in executive and public sessions relating to him; all reports and memoranda reflecting collaboration with federal agencies and reports made to the governors and legislatures of New York and New Jersey, including those reports in preparation for the next legislative sessions. This is only part of the discovery and inspection sought."

Special Term denied petitioner's application for pre-trial examination and discovery upon the ground, among others, that "It is obvious from the nature of the information sought by Marchitto [petitioner] that he wishes the Commission to reveal not only information obtained by it in investigation as a law enforcement agency but also its mental processes in making its investigatory decisions" (R. 145).

1. While petitioner filed a notice of appeal from Special Term's order denying his motion for pre-trial examination and discovery, this appeal was never perfected. Rather, petitioner sought to review such order upon his appeal from the final contempt order. However, the discovery order was, of course, an intermediate order and, under the explicit provisions of section 580 of the New York Civil Practice Act, an appeal from a final judgment or order brings up for review an intermediate order "which is specified in the notice of appeal and necessarily affects the final judgment or order". Since petitioner's notice of appeal to the Appellate Division from the contempt

order did not specify the order denying his motion for pre-trial examination and discovery (R. 2-3), under New York practice the discovery order was not reviewable upon the appeal from the final contempt order. *O'Connor Long Island Properties Corp.* v. *Brackman*, 288 N. Y. 23; *In re Flanagan's Will*, 271 App. Div. 1014, 68 N.Y.S. 2d 248 (2nd Dept. 1947).

After the Commission filed its brief in the Appellate Division pointing out that petitioner had not properly brought up for review the order denying his discovery motion, petitioner unsuccessfully attempted several times to cure his error. First, petitioner moved in the Appellate Division to consolidate his unperfected appeal from the discovery order with his appeal from the contempt order. The Commission resisted this motion upon the ground that the pre-trial order was no longer extant since, as an intermediate order, it was merged into the final contempt order, that a separate appeal from an intermediate order could not be had once a final order or judgment was entered, *Jefferson Title & Mortgage Corp.* v. *Blue Spruce Realty Corp.*, 263 App. Div. 963, 33 N.Y.S. 2d 28 (2nd Sept. 1942); *Frank* v. *Rowland & Shafto*, 169 App. Div. 918, 153 N.Y.S. 926 (1st Dept., 1915), and that, rather, the provisions of Section 580 of the Civil Practice Act governed appeals once a final judgment or order was entered, which Section could not be circumvented in the manner attempted by petitioner. By order dated May 4, 1961, the Appellate Division affirmed the order of Special Term denying discovery and by an additional order dated May 9, 1961 the Appellate Division denied petitioner's motion to consolidate his appeal from the discovery order with his appeal from the contempt order upon the ground of mootness. Also by order dated May 4, 1961, the Appellate Division affirmed the order of Special Term adjudicating petitioner in civil contempt.

Thereafter, petitioner appealed as of right from the contempt order to the Court of Appeals upon purported constitutional grounds, stating in his notice of appeal that he

was also bringing up for review the order denying discovery. Petitioner also moved in the Appellate Division for leave to appeal to the Court of Appeals from the order denying discovery upon the ground that the constitutional aspects of such order were already before the Court of Appeals in his appeal taken as of right and that the non-constitutional aspects of the order presented important questions of law.

The Commission countered with a motion in the Court of Appeals to dismiss petitioner's appeal upon the ground that no substantial constitutional questions were involved. In its motion, the Commission specifically pointed out that no proper appeal had been taken by petitioner from the discovery order.

By order dated June 6, 1961, the Appellate Division denied petitioner's motion for leave to appeal to the Court of Appeals from the order denying discovery. And by order dated June 9, 1961, the Court of Appeals dismissed petitioner's appeal upon the ground that no substantial constitutional question was involved.

Finally, petitioner moved in the Court of Appeals for leave to appeal from the orders of the Appellate Division affirming Special Term's contempt and discovery orders. In its brief in opposition, the Commission again pointed out that no proper appeal had been taken by petitioner from the order denying discovery. By order dated October 5, 1961, the Court of Appeals denied petitioner's motion insofar as it sought leave to appeal from the contempt order and, in contradistinction, *dismissed* (not denied) the motion insofar as it sought leave to appeal from the discovery order (pet., pp. 30-31).

From the foregoing, it is evident that the Court of Appeals probably (and at the very least may have) dismissed petitioner's motion for leave to appeal insofar as it related to the discovery order upon the ground that no proper appeal had been taken therefrom under New York practice.

The failure to follow the prescribed procedure for obtaining appellate review in the state courts precludes, of course, review by this Court. E.g., *Parker* v. *Illinois*, 333 U. S. 571; *C.I.O.* v. *McAdory*, 325 U. S. 472, 477. And see *Stembridge* v. *Georgia*, 343 U. S. 541, 547-8, where this Court stated that it was without jurisdiction "when the question of the existence of an adequate state ground [for the decision] is debatable."

2. In any event, due process does not of course require *pre-trial* proceedings of any nature. And needless to say, under New York law a full trial-type hearing, where appropriate, may be had in a contempt proceeding. *Bata* v. *Bata*, 282 App. Div. 862, 124 N.Y.S. 2d 722 (1st Dept. 1953). Here, not only was a hearing inappropriate but no proper request therefor was made by petitioner.

B. The Alleged Denial of a Hearing.

1. First, petitioner did not argue before the Appellate Division, as he does here, that he was denied a hearing that he specifically requested. Rather, what petitioner did argue was that since (according to him) contempt proceedings of the instant kind were frequently determined upon affidavits, he was constitutionally entitled to a deposition as compulsory process for the purpose of obtaining witnesses in his favor. (See Appendix A hereto where there is set forth petitioner's entire argument on this point in his brief before the Appellate Division.) This is, of course, an entirely distinct argument. Not until the Commission pointed out in its brief in the Appellate Division that no proper appeal had been taken by petitioner from the order denying discovery did petitioner contend upon appeal, and then only in the Court of Appeals, that he had been unconstitutionally denied a hearing specifically requested by him. Of course, petitioner's failure to assert this objection in a timely fashion in the Appellate Division precludes review by this Court. E.g., *Parker* v. *Illinois*, *supra*; *C.I.O.* v. *McAdory*, *supra*.

Further, the fact is that petitioner in his brief before Special Term did not request Special Term to hold a hearing upon the issues presented by the within contempt proceeding. Rather, petitioner contended, as he did in the Appellate Division, that the denial of pre-trial discovery constituted a denial of compulsory process for obtaining witnesses in his favor and merely stated that he was specifically reserving his position upon this point should an appeal become necessary. (See Appendix B hereto where there is set forth petitioner's entire argument upon this point in his brief before Special Term.)

It is true that petitioner in his affidavit in opposition to the Commission's application to punish him for contempt did state that he was entitled to a hearing upon the allegations in the Commission's moving affidavit relating to the reasons for requiring petitioner's testimony (R. 171). This statement, consisting of two paragraphs, was buried in a myriad of other objections in petitioner's affidavit which incorporates by reference additional affidavits by petitioner and which, itself, occupies over fourteen printed pages in the record herein (R. 163-177). Moreover, we are sure that counsel for petitioner will agree that a transcript of the proceedings before Special Term would show that the Commission's contempt motion was submitted upon the papers with the affirmative and explicit consent of both the Commission and petitioner without any request for a hearing whatsoever.

2. Further, as noted, petitioner's reference to a hearing in his voluminous affidavit in opposition was concerned only with the Commission's stated purposes in requiring petitioner's testimony at its public hearings. Petitioner's statement on this matter in his affidavit is only partially quoted in the petition herein (p. 7); we set forth below, in the interest of accuracy, the entire statement (R. 171):

> "Finally, your deponent challenges as inaccurate the various statements made in the affidavit of William P.

Sirignano dated June 23, 1960, insofar as they relate to the purpose of the Commission's hearing, allege the existence of certain 'information' and purport to justify the putting of the particular questions. Under these circumstances, it is respectfully submitted that if the Commission's motion is not to be denied for inadequacy on its face, a decision should not be made upon the basis of an affidavit, particularly of a generalized and inadequate form presented by the Commission, but should be supported by testimony of witnesses subject to cross-examination by your deponent's counsel, with the additional protection of the granting of the motion to take the depositions and to have a discovery and inspection.

"For while your deponent does not concede the accuracy of any of the allegations made, obviously upon information and belief, in Mr. Sirignano's affidavit, it is impossible and would be improper to engage in a categorical denial of every statement until your deponent has had an opportunity to examine the witnesses offered in support of such allegations."

What the Commission said in its moving papers herein was that it had information that charters for two union locals had been granted by the ILA to certain notorious hoodlums and criminals, that petitioner was a trustee of such locals, and that consequently petitioner's testimony was desired at the Commission's public hearings on criminal influence in the ILA (R. 16-17). Accordingly, petitioner's reference in his affidavit in opposition to a hearing was limited to the Commission's stated purposes in requiring petitioner's testimony, and to no other issue. This identical contention (that is, a hearing should be held upon the Commission's stated purposes for requiring petitioner's testimony), was made by petitioner in the Commission's first contempt proceeding against him in the courts of New Jersey and was explicitly rejected by the Supreme

Court of New Jersey. *In the Matter of the Application of Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 334, wherein it was cogently stated:

> "The appellant argues that the conclusions as to the Commission's jurisdiction that the trial judge made are constitutionally permissible only after a 'full hearing,' with the right of cross-examination preserved to the appellant.
>
> "It is unclear what issues the appellant feels must be fully tried. If the Commission's information as to the appellant's activities and their connection with the waterfront must be tried for reliability or veracity, then the entire range of the Commission's investigation would be covered by a threshold inquiry into jurisdiction. If the issue to be tried is whether the Commission actually has the information it claims to have, then the whole preliminary investigative process would be subject to scrutiny in advance of any investigation. If either of these issues had to be fully tried in court on the question of the Commission's jurisdiction to proceed, the orderly discharge of the Commission's duty of investigation would be intolerably impaired."

To the same effect, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 213, 215-17 (judicial hearing for purpose of determining whether or not there existed a subject matter for investigation is inappropriate).

3. In any event, the within contempt proceeding presents only issues of law, and not any issues of triable fact. See, *infra*, Point II (petitioner's contention respecting the service of process herein), Point III (petitioner's contention that he was not sufficiently apprised as to the purposes of the Commission's investigation), Point IV

(petitioner's contention that the Commission failed to give the required statutory notice in granting him immunity from prosecution), and Point V (petitioner's contention that he was entitled to immunity from federal prosecution).

C. Petitioner's Notice to Admit.

1. Petitioner's contention that the Commission failed to contest his Notice To Admit does not of course constitute an independent reason for granting certiorari. Rather, this is simply a makeweight in support of petitioner's contention that he was unconstitutionally denied both pretrial discovery and a hearing and falls therewith.

2. Further petitioner omits entirely to refer to the fact that the Commission did file a reply to petitioner's Notice To Admit in which the Commission set forth its legal reasons for its refusal either to admit or deny the matters in petitioner's Notice (R. 162). Since under New York law a motion to set aside a Notice To Admit does not lie, a party may serve an answer setting forth his reasons for his refusal to comply with the notice and the sanction, if any, in the event the trial court determines that such refusal was unreasonable, is the assessment of reasonable expenses incurred by the other party in proving the facts set forth in the notice. *Rowland* v. *State*, 172 N.Y.S. 2d 420 (Ct. Cl., 1957), and the decisions cited therein. Accordingly, the matters in petitioner's Notice To Admit were not admitted by the Commission.

POINT II

Petitioner's contention that under the Waterfront Commission Act he was immune from service of process and further that he was fraudulently enticed into New York by the Commission was not properly raised in the Courts below and in any event is without merit.

Petitioner makes two contentions in connection with his motion below to set aside the service herein. The first is that he was immune from process under Section 5-m of the Waterfront Commission Act (McK. Unconsol. Laws 9917) (pet., pp. 11-12, 24). Petitioner further contends that his presence in New York was the result of the Commission's fraud and deceit constituting a denial of due process (pet., pp. 13-14). Petitioner resides in Jersey City, New Jersey (R. 23), immediately across the Hudson River from New York City.

1. As in the case of the discovery order, petitioner in his notice of appeal to the Appellate Division from the final contempt order herein failed to specify that he was bringing up for review the order denying his motion to set aside the service herein (R. 2-3). Since such order was of course an intermediate order, petitioner, as in the case of the discovery order, failed to comply with the aforesaid provisions of Section 580 of the New York Civil Practice Act and accordingly this order was not reviewable in connection with petitioner's appeal from the contempt order. It therefore follows, as in the case of the discovery order, that the order herein of the Court of Appeals denying petitioner's motion for leave to appeal from the contempt order, insofar as it involved the question of service, rests upon an adequate state ground and is not subject to review by this Court. E.g., *Parker* v. *Illinois*, *supra*; *C.I.O.* v. *McAdory*, *supra*.

2. Section 5-m of the Waterfront Commission Act (McK. Unconsol. Laws 9917) provides in effect that a non-resident witness appearing pursuant to Commission subpoena is exempt from arrest and service of civil or criminal process "in connection with matters which arose before his entrance into such state under the subpoena" (pet., p. 24). The Commission has the express statutory power under the Waterfront Commission Act to issue subpoenas throughout both the States of New York and New Jersey (Art. IV, McK. Unconsol. Laws 9810). Section 5-m was enacted in order to obviate the objection by non-resident New Jersey witnesses that they may become amenable in New York to the service of other process *in an unrelated matter* and in order to conduce obedience to the Commission's subpoenas. See *In the Matter of the Application of the Waterfront Commission of New York Harbor*, 39 N. J. Super 33, 43-44 (1956), where such an objection was specifically raised by a New Jersey witness and overruled by the court. As stated, in order to obviate this objection and in order to conduce obedience to the Commission's sub poenas, Section 5-m was promptly enacted following such decision, upon the recommendation of the Commission, at the 1956 sessions of both the Legislatures of New York and of New Jersey (New York Laws 1956, c. 457; New Jersey Laws 1956, c. 19).

Accordingly, the clear intentment of Section 5-m is to encourage obedience to Commission's subpoenas by granting an exemption from process *in an unrelated matter*. Here, the petitioner was served in New York in the instant contempt proceeding after he refused to testify at the Commission's public hearings being held in New York. Thus, petitioner was not served *in an unrelated matter* but rather in aid of the very matter for which his presence was required in New York in the first instance. Compare, for example *Lamb* v. *Schmitt*, 285 U. S. 222, 226, where this Court stated, in sustaining service on a non-resident attor-

ney in the same matter in connection with which he had entered the state, that "It has never been doubted that [nonresident] witnesses, parties, and their counsel are amenable to the process or order of the court for contempt of court, committed while in attendance upon the trial, or that any of them while there, are subject to the process and orders of the court to compel the production of documents or their testimony in the cause."

The question in any event does not involve more than a nice procedural point. It is hardly an issue of such significance and importance as to warrant review by this Court.

3. Petitioner also contends that after he refused to testify at the Commission's public hearings in New York the Commission deceived him into returning to New York the next day under the false pretext that his testimony was desired and that this trickery raises a substantial question of due process (pet., pp. 13-14). The short and conclusive answer is that petitioner's presence in New York on the day of service was the result solely of the legal compulsion of the Commission's subpoena, and not of any fraud or misrepresentation. The Commission simply continued petitioner's subpoena in force for the purpose of bringing him before a court to answer for his contumacious conduct, as it had every right to do (R. 43).

Petitioner's contention that his presence in New York was obtained by the Commission's fraud and misrepresentation assumes that he had the legal right to disregard the Commission's direction to return pursuant to the Commission's subpoena if he knew that he was going to be served with contempt papers, which simply begs the entire question. Further, when petitioner was directed to return to New York the next day, there was an explicit statement by the Commission's General Counsel that the Commission would institute appropriate court proceedings (R. 43).

Finally, petitioner was given an additional opportunity by the Commission upon his return to New York to change his mind and to testify, which petitioner refused to do (R. 74-75).

POINT III

Petitioner's contention that he was not apprised of the subject matter of the investigation was never asserted before the Commission and in any event is without merit.

1. Petitioner's objection that he was never properly apprised as to the subject matter of the Commission's investigation (pet., pp. 17-18) was never asserted by petitioner at the Commission's public hearings. The grounds asserted by petitioner before the Commission for his refusal to testify at the public hearing, notwithstanding the grant of immunity from prosecution, were that the notice of immunity to the various prosecuting officials was defective and that petitioner had not been given immunity from federal prosecution (R. 17, 34-37). Since the instant objection was never raised at the Commission's public hearing, the objection was not of course properly asserted. *Barenblatt* v. *United States*, 360 U. S. 109, 123-124 (in criminal prosecution for contempt of Congress, objection to pertinency of questions is not available where this objection was not made at the time the questions were asked).

2. The objection is, in any event, entirely disingenuous. It will be remembered that the purpose of the Commission's public hearings was to determine the existence and extent of criminal influence in the ILA with a view to making legislative recommendations to the Governors and Legislatures of New York and New Jersey (R. 16). With specific reference to petitioner, the purpose of his testimony was to ascertain the facts concerning the issuance of charters for certain union locals by the ILA to criminal elements (R. 16-17).

The subject matter to be covered by petitioner's testimony had been made unequivocally clear in the prior contempt proceeding instituted against petitioner by the Commission in the courts of New Jersey (R. 109-110). Indeed, the Supreme Court of New Jersey in sustaining an adjudication of civil contempt against an identical objection by petitioner in such prior contempt proceeding stated that petitioner "was fully apprised, prior to his being called, of the subject matter of the investigation." *In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 338 (R. 132). Certainly, by the time of the public hearings which was about a month after this decision by the Supreme Court of New Jersey, petitioner knew why his testimony was wanted.

Further, the General Counsel of the Commission at the beginning of the public hearings made an opening statement as to the matters to be covered (R. 136-139). In addition, when petitioner was granted immunity from prosecution, the notices of the Commission's intention to confer such immunity upon petitioner were introduced in the record at the public hearing and these state in specific detail the subject matter to be covered by petitioner's testimony (R. 44-67).

Finally, it warrants emphasis that petitioner has been adjudicated guilty of *civil* contempt. See, for example, the decision of the Supreme Court of New Jersey sustaining petitioner's civil contempt adjudication in the prior contempt proceeding against him wherein there is a specific *quaere* as to whether this Court's decisions on criminal contempt convictions, such as *Watkins* v. *United States*, 354 U. S. 178, have any applicability to a civil contempt proceeding. *In the Matter of the Application of the Waterfront Commission of New York Harbor (Anthony Marchitto)*, *supra*, at page 337.

POINT IV

Petitioner's contention that the Commission failed to give the required statutory notice to all the prosecutors with an official interest therein of its intention to grant petitioner immunity from prosecution was never asserted before the Commission and in any event is without merit.

1. Still another of petitioner's objections to the within contempt adjudication is that the Commission failed to give the proper statutory notice of its intention to grant petitioner immunity from prosecution because the Commission did not give written notice to all the appropriate prosecutors with an official interest therein. As noted, the grounds asserted by the petitioner before the Commission for his refusal to testify at the Commission's public hearings were that he had not been granted immunity from federal prosecution and that the notice of immunity to the various prosecuting officials was defective because it set forth only the subject matter upon which the petitioner was to be questioned, and not the specific questions themselves (R. 17, 34-37). Since petitioner's present contention was never raised at the Commission's public hearings, the objection was not properly asserted. *Barenblatt* v. *United States, supra.*

2. Petitioner's contention respecting the notice of the Commission's contention to grant immunity overlooks entirely the fact that Section 5-b(5), pursuant to which the Commission granted immunity (pet., pp. 23-24), explicitly provides that the immunity granted thereunder shall be absolute even if there is a total failure to notify the appropriate public officials. This was pointed out by the New York Appellate Division with respect to a similar immunity statute in *Commission of Investigation* v. *Lombardozzi*, 7 A. D. 2d 48, 180 N.Y.S. 2d 496 (1st Dept. 1958), aff'd 5

N. Y. 2d 1026, 6 N. Y. 2d 744, 753, *cert. den.*, 360 U. S. 930:

> "When requested in these proceedings, the Commission informed each appellant that it had afforded the Attorney-General and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the Commission as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the Commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute."

Hence, petitioner was not hurt by and thus cannot complain of the Commission's alleged failure to notify all the prosecutors with an interest in the matter. Indeed, the manifest purpose of Section 5-b(5) is to preclude the very type of objection now sought to be asserted by petitioner.

POINT V

Petitioner had no constitutional right to refuse to testify upon the ground that he had not been granted immunity from federal prosecution.

Petitioner's final objection to the within contempt adjudication is that he had been granted only immunity from state prosecution and not immunity from federal prosecution (pet., pp. 14-16). Petitioner asserts that the instant investigation by the Commission was the result of collaboration between the Commission and federal agencies and, further, that in effect the Commission, which was created by an interstate compact consented by Congress, is for present purposes a federal instrumentality.

1. Section 5-b(5) of the Waterfront Commission Act, pursuant to which petitioner was granted immunity from prosecution (pet., pp. 23-24), was enacted in 1956 in New Jersey (1956 Laws of New Jersey, c. 194) and in 1957 in New York (1957 Laws of New York, c. 188) and is expressly patterned after, and substantially identical to, Section 2447 of the New York Penal Law. (See Commission's Legislative Memorandum, McKinney's 1957 Session Laws of New York, p. 2053.) In *Knapp* v. *Schweitzer*, 357 U. S. 371, this Court sustained the constitutional validity of the grant of immunity from prosecution pursuant to Section 2447 of the New York Penal Law against the same contention, as here, that no immunity from federal prosecution had been conferred. Hence, petitioner in effect requests this Court to review the selfsame statute and question as were recently involved in *Knapp*.

As a reason for issuance of certiorari herein, petitioner asserts throughout his petition that there was cooperation between the Commission and federal agencies in the instant investigation. However, this is no more than *ipse dixit* by petitioner, for there is nothing in the record herein

whatsoever to support these completely conclusory and unsupported assertions of such cooperation. Here, as in *Knapp*, "the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation" (357 U. S. 371, 380). There is not involved herein any of the numerous elements of federal-state cooperation which were present in *Mills* v. *State of Louisiana*, 360 U. S. 230, where, notwithstanding such cooperation, this Court sustained the state grant of immunity from state prosecution. Indeed, there is not even present here, as there was in *Knapp*, the fact "that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law [involved therein]" (357 U. S. 371, 380).

Nor does it lie in petitioner's mouth to claim that the denial of his motion for discovery prevented him from proving the existence of cooperation between the Commission and federal agencies. Plainly, a witness in a state investigation has no federal right to roam at will through the files of the state investigating agency, and to interrogate state officials, in the hope that perhaps he may happen upon some evidence of such cooperation.

2. Another basis for petitioner's claim that he was constitutionally required to be granted immunity from federal prosecution is the contention in effect that the Commission, for present purposes, is a federal agency subject to the provisions of the Fifth Amendment because it was created by an interstate compact approved by Congress. However, beyond the granting of consent to the original Compact, the federal government has had no part whatever in the creation, maintenance or operation of the Commission. In fact, Congress, in approving the Compact, expressly gave its approval to supplementary *state* legislation in accord with the objectives of the Compact (Act of August 12, 1953, 67 Stat. 541, c. 407), a "provision in the

consent by Congress to a compact . . . so extraordinary as to be unique in the history of compacts". *DeVeau* v. *Braisted*, 363 U. S. 144, 154. The law in any event is established that Congressional consent to an interstate compact does not constitute the agency created thereunder a federal instrumentality. E.g., *Hinderlider* v. *La Plata River Co.*, 304 U. S. 92 (interstate compact not a treaty or statute of United States within meaning of statute defining this Court's appellate jurisdiction); *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (2nd Cir. 1944), *cert. den.*, 323 U. S. 792 (Port of New York Authority is a "political subdivision" of States of New York and New Jersey within meaning of Revenue Act excluding from taxation the interest on obligations of a state or political subdivsion thereof).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM P. SIRIGNANO,
General Counsel of the Waterfront
Commission of New York Harbor,
Attorney for Appellee,
15 Park Row,
New York 38, N. Y.

Of Counsel:

IRVING MALCHMAN,
Assistant to the General Counsel.

Dated: December 13, 1961.

APPENDIX A

Excerpt From Petitioner's Brief in Appellate Division.

POINT I

Since this is a quasi-criminal proceeding, appellant was constitutionally entitled to a deposition as "compulsory process for obtaining witnesses in his favor."

It is well settled that contempt proceedings, whether denominated civil or criminal, are quasi-criminal in character. *Erie R. Co.* v. *Ramsey*, 45 N. Y. 637; *Bridgeman* v. *American Book Co.*, 12 Misc. 2d 63; *Sadounik* v. *Goldfarb*, 206 Misc 948; *Matter of Simington*, 147 Misc. 504.

Accordingly, the respondent in contempt proceedings is entitled to compulsory process for the purpose of obtaining witnesses in his favor. Constitution of the State of New York, Art. I, Sec. 1; Constitution of the United States, Fifth and Sixth Amendments.

In contempt proceedings of this kind the case is frequently determined upon affidavits. Without conceding the validity under the Constitution of this procedure, it requires at the very least that the alleged contemnor enjoy the benefits of compulsory process by deposition prior to the contempt proceedings.

Such a remedy is, in fact, afforded by Section 308 of the New York Civil Practice Act, which provides:

> "Testimony may be taken by deposition, under this article, in a special proceeding, or for use in such a proceeding about to be brought, as though the proceeding were an action."

The denial by Mr. Justice Backer of appellant's motion to take the Commission's deposition denied him his statutory and constitutional rights. Appellant took an appeal from that order but was not able to perfect it because of the imminence of hearing of the contempt proceedings on the merits. He urged this denial in the said proceedings (fol. 489) and has thus preserved it upon the appeal.

APPENDIX B

Excerpt From Petitioner's Brief in Special Term.

POINT I

Since this is a quasi-judicial proceeding, respondent is constitutionally entitled to a deposition as "compulsory process for obtaining witnesses in his favor."

It is well settled that contempt proceedings whether denominated civil or criminal, are quasi-criminal in character. *Erie R. Co.* v. *Ramsey*, 45 N. Y. 637; *Bridgeman* v. *American Book Co.*, 12 Misc. 2nd 63; *Sadownik* v. *Goldfarb*, 206 Misc. 948; *Matter of Simington*, 147 Misc. 504.

Accordingly, the respondent in contempt proceedings is entitled to compulsory process for the purpose of obtaining witnesses in his favor.

> Constitution of the State of New York, Art. I, Sec. 1.
>
> Constitution of the United States, Fifth and Sixth Amendments.

In contempt proceedings of this kind the case is frequently determined upon affidavits. Without conceding the validity under the Constitution of this procedure, it requires at the very least that the respondent enjoy the benefits of compulsory process in his favor prior to the contempt proceedings, namely, by deposition.

Such a remedy is, in fact, afforded by Section 308 of the New York Civil Practice Act, which provides:

> "Testimony may be taken by deposition under this article, in a special proceeding, or for use in such a proceeding about to be brought, as though the proceeding were an action."

The denial of respondent's motion to take the Commission's deposition is of course not reviewable by this Court. Respondent therefore reserves his position upon this point should an appeal become necessary.